

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA  
Augusta Division

IN RE:	)	Chapter 7 Case
	)	Number <u>97-12537</u>
CHARLES NORRIS	)	
	)	
Debtor	)	
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	)	
EDWARD J. COLEMAN, III,	)	FILED
CHAPTER 7 TRUSTEE	)	at 11 O'clock 00 min. A.M.
	)	Date: 3-19-98
Movant	)	
	)	
vs.	)	
	)	
CHARLES NORRIS	)	
	)	
Respondent	)	

**ORDER**

Edward J. Coleman, III the Chapter 7 trustee filed an objection to the debtor's, Charles Norris', claim of exemption in .84 acres of land transferred by the Debtor to his father, Charles T. Norris, two months prior to Debtor's filing for chapter 7 relief. The Trustee's objection is sustained.

Debtor owned .84 acres of land in Columbia County, Georgia, on which he and his fiancée lived in a mobile home. Prior to the bankruptcy filing the Debtor and his fiancée argued, leading him to transfer ownership of the land to his father in July 1997 for fear that the fiancée, as mother of his child, could

legally take the property. On September 22, 1997 Debtor filed a voluntary chapter 7 case. He claimed the land in his original schedule C as exempt under Georgia's homestead exemption O.C.G.A. § 44-13-100(a)(1), and included a notation "\*Transferred interest to Father in July, 1997." On December 5, 1997, he amended his schedule C exemption of the land to add O.C.G.A. § 44-13-100(a)(6).<sup>1</sup> The trustee objected to the original exemption on November 13, 1997, which objection also applies to Debtor's amended schedule C.

Debtor conceded at hearing that the transfer of this property approximately two months prior to filing chapter 7 fulfilled the meaning of "fraudulent conveyance" under 11 U.S.C. § 548(a)(2)(A) & (B)(i).<sup>2</sup> The Trustee asserts that the property

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<sup>1</sup>O.C.G.A. § 44-13-100 provides in relevant part:

(a) In lieu of the exemption provided in Code Section 44-13-1, any debtor who is a natural person may exempt, pursuant to this article, for purposes of bankruptcy, the following property:

(1) The debtor's aggregate interest, not to exceed \$5,000.00 in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence, or in a burial plot for the debtor or a dependent of the debtor; . . .

(6) The debtor's aggregate interest, not to exceed \$400.00 in value plus any unused amount of the exemption provided under paragraph (1) of this subsection, in any property

<sup>2</sup>11 U.S.C. § 548(a)(2)(A) & (B)(i) provides in relevant part:

(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily

(2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result

was transferred two months pre-petition, the transfer is a fraudulent conveyance and a debtor cannot exempt property recovered by a trustee as a fraudulent conveyance made voluntarily by the debtor. Upon the return of the property to the estate Debtor claims an equitable interest in the property by virtue of an expectancy interest upon the father's return of the property to him or the father's death, or by Debtor's status as a tenant at will. Furthermore, the Debtor asserts that the "diminution of estate" theory allows him to exempt the land based upon his disclosure of the transfer and the land being wholly exemptible under the Georgia homestead exemption, so creditors could not be harmed by the exemption.

The issue to be resolved is whether Debtor has an interest in the property to exempt. Debtor's claimed exempt property interest concedes that he held no ownership interest in the property at filing by including in the Schedule C exemption "\*Transferred interest to Father in July, 1997". Debtor voluntarily transferred all property interest prior to filing bankruptcy. Therefore, he had no property interest to exempt under O.C.G.A. § 44-13-100(a)(1) and (6).

Debtor cannot exempt the property once it is brought back into the estate by the Trustee. Debtor's voluntary transfer of the property waives his ability to claim the exemption. Lasich v. Estate of A.N. Wickstrom (Matter of Wickstrom), 113 B.R. 339

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of such transfer or obligation . . .

(Bankr. W.D. Mich. 1990) (Debtor's transfer of entireties property pre-petition showed conscious decision not to claim the property as exempt). However, in his brief Debtor argues the interest in the property he holds is equitable arising from an "expectancy interest," or is a tenancy at will interest. These interests do not amount to interests in property as claimed in schedule C that can be exempted under O.C.G.A. § 44-13-100. His first asserted interest arising from an expectancy that he will someday be given the land by his father or inherit it upon the death of his father does not create a property interest.

As for the argument that Debtor has a tenancy at will interest, this also fails to assert an interest available for an exemption. The tenancy at will ends at the will of the landlord. Furthermore, even if this interest were considered exemptible, a trustee upon recovery of the land has the option to terminate this tenancy interest on behalf of the estate. Therefore, no property interest exists for Debtor to exempt in this real property pursuant to O.C.G.A. § 44-13-100.

Debtor also asserts that he will attempt to exempt the land once it is brought back into the estate under 11 U.S.C. § 522(g)(1).<sup>3</sup> Debtor argues that § 522(g)(1) incorporates the

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<sup>3</sup>11 U.S.C. § 522(g)(1). Exemptions.

(g) Notwithstanding sections 550 and 551 of this title, the debtor may exempt under subsection (b) of this section property that the trustee recovers under sections 510(c)(2), 542, 543, 550, 551, or 553 of this title, to the extent that the debtor could have exempted such property under subsection (b) of this section if such property had not been transferred, if--

(1)(A) such transfer was not a voluntary transfer of such

"diminution of estate" doctrine, which according to the Debtor would allow any part of the estate that would be exempted to remain exemptible. Exempting the property would not harm the creditors under the Debtor's theory because they could not have expected to receive the property had the property not been transferred pre-petition and exempted. Debtor's reliance on Deel Rent-A-Car, Inc. v. Levine, 721 F.2d 750 (11<sup>th</sup> Cir. 1983) is misplaced. The diminution of estate doctrine is not available to the Debtor. "The doctrine prevents a trustee from avoiding a preferential transfer when he cannot bring the asset back into the estate to benefit creditors other than the transferee (citations omitted)." Id. at 755. "[T]he phrase diminution of estate doctrine mean[s] the consideration of whether the transferred assets would be available to meet creditors claims." Id. at 757 n.19 (emphasis original). This theory is therefore inapplicable to the § 522(g) analysis in this case. The recovered asset would be available to pay creditor claims. From a clear reading of the text of § 522(g)(1) in order to be exemptible the recovered property must have been involuntarily transferred and not concealed. Here, Debtor voluntarily conveyed the property.

It is, therefore, ORDERED that the trustee's objection to Debtor's claim of exemption is sustained.

JOHN S. DALIS

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property by the debtor; and

(B) the debtor did not conceal such property

CHIEF UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia

this 19th day of March, 1998.